Tenaga Nasional Bhd v Asia Knight Bhd (previously known as Pahanco Corp Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(NCVC)(W)-425–03 OF 2016
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
8 NOVEMBER 2017

Public Utilities — Electricity — Meter-tampering — Foreign object inserted in meter installation — Whether appellant succeeded in proving that meter installation tampered — Whether appellant entitled to claim for loss of revenue — Whether appellant's claim for expenses proven — Electricity Supply Act s 38(1), (3) & (4)

The appellant claimed against the respondent for loss of revenue and expenses due to meter tampering pursuant to s 38 of the Electricity Supply Act 1990 ('the Act'). The appellant's employees had discovered physical evidence of tampering to the meter installation. A foreign copper object was inserted as a by pass at the test terminal block. Photographs of the physical evidence, 'borang siasatan perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', surat pemberitahuan pengamibilan barang kes' and a police report were produced. The High Court dismissed the appellant's claim on the main ground that the appellant had failed to prove that the respondent had access to the meter installation. The appellant appealed against the dismissal of its claim against the respondent. The issue for the court's determination was whether the appellant had succeeded in proving that the meter installation was tampered.

Held, allowing the appeal with costs and setting aside the order of the High Court:

(1) Based on the appeal record, there was uncontroverted evidence to show that the meter installation had been tampered. The discovery of the foreign copper object which was inserted in the meter was proof of the fact of tampering. Further, there as a non-finding by the learned judge on the question of whether the meter was tampered, which was a serious misdirection on the facts and on the law. In totality, on a balance of probabilities, the appellant had succeeded in proving that the meter was tampered (see para 11).

(2) Pursuant to s 38(3) of the Act, the appellant was not required to prove that the perpetrator of the tampering was the respondent or that the respondent had access to the meter installation before a claim for loss of revenue could be made by the appellant. The appellant's entitlement to claim for the loss of revenue was a statutory right conferred on the

appellant under s 38(3) read together with s 38(1) of the Act. Accordingly, the appellant was entitled to claim for loss of revenue and expenses from the respondent (see para 12). A

(3) On the facts of the case ie the sudden drop in electricity consumption of 71%, the average consumption method of computation was a fair, acceptable and reasonable method to be employed in arriving at the quantum of loss of revenue (see para 13). B

(4) In accordance with s 38(4) of the Act, the written statement relating to the expenses incurred dated 29 September 2010 specifying the amount of expenses incurred by the appellant was prima facie evidence of payment. As there was no rebuttal evidence of the prima facie case made out by the appellant, the appellant's claim for expenses incurred have been proven on a balance of probabilities (see para 14). C

[Bahasa Malaysia summary D

Perayu menuntut terhadap responden bagi kerugian pendapatan dan perbelanjaan akibat usikan meter berikutan s 38 Akta Bekalan Elektrik 1990 ('Akta'). Pekerja-pekerja perayu telah mendapati keterangan fizikal pengusikan kepada pemasangan meter tersebut. Objek tembaga asing dimasukkan sebagai pintasan di blok terminal ujian. Gambar keterangan fizikal, 'borang siasatan perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', surat pemberitahuan pengamibilan barang kes' dan laporan polis dikemukakan. Mahkamah Tinggi menolak tuntutan perayu atas alasan utama bahawa perayu telah gagal untuk membuktikan bahawa responden mempunyai akses kepada pemasangan meter tersebut. Perayu merayu terhadap penolakan tuntutannya terhadap responden. Isu untuk penentuan mahkamah adalah sama ada perayu telah berjaya dalam membuktikan bahawa pemasangan meter telah diusik. E F

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah Mahkamah Tinggi: G

(1) Berdasarkan rekod rayuan, terdapat keterangan yang tidak dipertikaikan untuk menunjukkan bahawa pemasangan meter telah diusik. Penemuan objek tembaga asing yang mana dimasukkan ke dalam meter adalah bukti fakta terhadap pengusikan. Selanjutnya, tidak terdapat dapatan oleh hakim yang bijaksana atas persoalan sama ada meter diusik, yang mana adalah salah arah serius dari segi fakta dan dari segi undang-undang. Secara keseluruhan, atas imbangan kebarangkalian, perayu telah berjaya dalam membuktikan bahawa meter diusik (lihat perenggan 11). H I

(2) Berikutan s 38(3) Akta, perayu tidak diperlukan untuk membuktikan bahawa pelaku pengusikan adalah responden atau bahawa responden mempunyai akses kepada pemasangan meter tersebut sebelum tuntutan untuk kerugian pendapatan dibuat oleh perayu. Hak perayu untuk

menuntut bagi kerugian pendapatan adalah hak statutori diberikan kepada perayu di bawah s 38(3) dibaca bersama dengan s 38(1) Akta. Oleh itu, perayu berhak kepada tuntutan bagi kerugian pendapatan dan perbelanjaan daripada responden (lihat perenggan 12).

(3) Atas fakta kes iaitu penurunan secara tiba-tiba penggunaan elektrik sebanyak 71%, kaedah penggunaan purata pengiraan adalah adil, boleh diterima dan kaedah yang munasabah untuk digunakan dalam mencapai kuantum kerugian pendapatan (lihat perenggan 13).

(4) Mengikut s 38(4) Akta, pernyataan bertulis berkaitan perbelanjaan yang ditanggung bertarikh 29 September 2010 menyatakan jumlah perbelanjaan yang ditanggung oleh perayu adalah prima facie keterangan pembayaran. Memandangkan tidak terdapat pematahan keterangan terhadap kes prima facie yang dibuat oleh perayu, tuntutan perayu untuk perbelanjaan yang ditanggung telah dibuktikan atas imbangan kebarangkalian (lihat perenggan 14).]

Notes

For cases on meter-tempering, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2420–2422.

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217, CA (refd)

Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd [2014] 6 MLJ 461, CA (refd)

Tenaga Nasional Bhd v AWP Enterprise (M) Sdn Bhd [2015] 3 MLJ 268, CA (folld)

Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd [2015] 6 CLJ 751, CA (folld)

Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd) [2014] 8 MLJ 280, HC (folld)

Tenaga Nasional Bhd v Pelantar Cergas Sdn Bhd (Civil Appeal No W-02(NCC)(W)-1552–07 of 2012) (unreported), FC (refd)

Tenaga Nasional Bhd v Perniagaan Heng Thye Sdn Bhd (Civil Appeal No K-04(NCVC)(W)-59–02 of 2014) (unreported) (folld)

Tenaga Nasional Bhd v Ternakan Air Wui Kyee Sdn Bhd & another appeal [2015] MLJU 2136; [2015] 5 CLJ 955, CA (folld)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd (Judicial Review Application No R1–25–24 of 2010) (unreported), HC (folld)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (folld)

Legislation referred to

Electricity Supply Act 1990 s 38, 38(1), (3), (4)

Appeal from: Suit No 22NCVC-11–02 of 2014 (High Court, Kuantan)

Raja Ahmad Mohzanuddin Shah Raja Mohzan (Nur Fardhiah Mohd Nawawi with him) (Azmi & Assoc) for the appellant.
Dinesh Nair (CM Lai with him) (Bahari Choy & Nongchik) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This is the plaintiff's appeal against the dismissal of its claim against the defendant, a registered customer of electricity supply, for loss of revenue and expenses due to meter tampering pursuant to s 38 of the Electricity Supply Act 1990 ('the EA 1990').

[2] On 20 February 2017, after hearing of submission of counsel of the parties, we allowed the plaintiff's appeal with costs. We now set out our reasons for our decision. In this judgment the parties shall be referred to as they were in the court below.

BRIEF ACCOUNT OF THE SALIENT FACTS

[3] On 29 September 2010, a team of the plaintiff's employees conducted an inspection of the meter installation at the defendant's premises. The plaintiff's employee found physical evidence of tampering to the meter installation in the form of a foreign copper object inserted as a by pass at the test terminal block ('TTB'). Photographs taken of the physical evidence of tampering together with the 'borang siasatan perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', 'surat pemberitahuan pengambilan barang kes' and a police report were produced at the trial.

FINDINGS OF THE HIGH COURT

[4] The claim was dismissed on the main ground that the plaintiff had failed to prove that the defendant had access to the meter installation. In dismissing the plaintiff's claim, the learned judge found among others, that:

(a) as the defendant had no access to the meter room, anything that happened in the meter room was not within the defendant's knowledge and responsibility;

(b) the plaintiff failed to prove that the foreign copper object at the TTB was inserted by the defendant;

(c) there was no evidence to prove that the blown fuse was caused by the defendant's action;

(d) there was no finality on the findings made of the tampering as the inspection form was not verified by the plaintiff's senior officer; and

(e) the calculation of the undercharged amount from 28 September 2008–29 September 2010 was not correct because the computation did not take into account, among others; (i) the fact that there was a change of meter on 10 March 2010; (ii) the defendant's manufacturing activities had shown that there was some fluctuation in the electricity consumption at the defendant's premises; and (iii) previous inspections at the defendant's premises on 28 March 2009 and 21 April 2009 had shown that there abnormalities and that the meter was not in good working condition.

SUBMISSION OF PARTIES

[5] Before us, learned counsel for the plaintiff mounted his case on two main grounds — (i) there was proof of meter tampering and (ii) the computation of loss or revenue and expenses is correct.

[6] Firstly, he argued that the plaintiff had succeeded in proving meter tampering on the balance of probabilities despite the learned judge's finding that the plaintiff had failed to prove that the defendant had access to the meter installation. Section 38 of the EA 1990 does not require the plaintiff to prove that the defendant had access to the meter installation before a claim for loss of revenue can be made by the plaintiff. All that the plaintiff is required to show is that there was evidence of tampering of the meter installation which prevented the meter from duly recording the consumption of electricity by the defendant. Further, in holding that the plaintiff had to prove that the defendant had access to the meter installation and that the tampering was committed by the defendant, the learned judge had imposed a higher standard of proof of beyond reasonable doubt on the plaintiff to prove its case; the plaintiff was only required to prove its case on a balance of probabilities (*WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 (FC)).

[7] Learned counsel also argued that under sub-s 38(3) of the EA 1990 the plaintiff need not prove that the defendant tampered with the meter installation; it is sufficient if the plaintiff can show that the meter has been tampered (*Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751 (CA)). Further, it is clear that the defendant had benefited from the tampered meter installation and as such it would be abhorrent to justice and fair play for the court to condone a consumer who has benefited to escape payment to the plaintiff for its electricity usage (*Tenaga Nasional Bhd v*

Ternakan Air Wui Kyee Sdn Bhd & another appeal [2015] MLJU 2136; [2015] 5 CLJ 955 (CA)). A

[8] On the second issue, learned counsel argued that the learned judge erred in holding that the plaintiff failed to take into account the defendant's production report. Instead of producing the complete daily reports the defendant only produced selected daily reports. Daily reports were produced in respect of non-production days even though the defendant's own witnesses said that when there was no production, no daily report was prepared. Further, daily reports prepared for Sundays actually contradicted the defendant's evidence that they had not for years operated on most Sundays because of the double overtime costs for their workers. B C

[9] Even if the defendant's production reports were considered, they would not support the defendant's defence which were mounted on the following grounds: (i) the usage of electricity at the defendant's premises was not consistent and was dependent on orders made for the products; (ii) the inconsistency of electricity usage was due to the combination of two production lines at the defendant's premises; (iii) from 2008–2009, there was an economic downturn and therefore production was reduced; (iv) the inconsistency in the electricity usage was also caused by a fire at the factory on 24 July 2010; (v) the defendant bought new machines from China to made wood pallets in 2010; and (vi) the defendant's electricity usage was consistent with the issued bills and the defendant had paid those bills without fail and without complaint from the plaintiff. D E F

[10] In reply, learned counsel for the defendant raised the following arguments. Firstly, the meter installation could not have been tampered because the meter was located in a special room which was locked with the plaintiff's own padlock and that no one else except for the plaintiff's staff had the key to the padlock. The learned judge was correct in finding that the plaintiff had failed to prove that the defendant had access to the meter room to tamper with the meter. Secondly, sub-s 38(3) of the EA 1990 did not exempt the plaintiff from having to prove that the defendant tampered with the meter. The onus is on the plaintiff to prove that the meter was tampered. There was no finding of fact of tampering by the learned judge. Thirdly, there were at least two inspections conducted by the plaintiff's employees on 28 March 2009 and 21 April 2009 prior to 29 September 2010 which did not show any evidence of tampering. Further, the meter was changed about six months before the inspection date. As such, there were intervening events during the two year period. Lastly, the learned judge was correct in her assessment of the evidence on quantum. As such, the plaintiff had not shown that the learned judge's findings were plainly wrong. G H I

A DECISION

[11] In our considered opinion, the central issue for determination relates to the question of whether the plaintiff had succeeded in proving that the meter installation was tampered. On a perusal of the appeal record, we are satisfied that there is uncontroverted evidence to show that the meter installation had been tampered. The discovery of the foreign copper object which was inserted in the meter is proof of the fact of tampering. We agree with the submission of learned counsel for the plaintiff that the evidence produced by the plaintiff's witnesses were consistent and credible. It was also corroborated by the production of the photographs, the 'borang siasatan perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', 'surat pemberitahuan pengambilan barang kes' and police report. In this connection, we have perused the learned judge's written judgment and note that the learned judge did not make any finding that there was no tampering of the meter. Instead, the learned judge took the position that there was no evidence to prove that the defendant had access to the meter installation or had tampered with the meter. In other words, there was a non-finding on the question of whether the meter was tampered, which in our considered view is a serious misdirection on the facts and on the law. We also find support for our view in the Federal Court decision which held that only a subjective finding of the plaintiff's employee is required to prove tampering *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*. On the totality of the evidence we are of the view that on a balance of probabilities the plaintiff had succeeded in proving that the meter was tampered.

[12] Be that as it may, the learned judge also took the view that the defendant could not be liable for the loss of revenue as it was not proved that the defendant had access to the meter room or had tampered with the meter. In our considered view, sub-s 38(3) of the EA 1990 does not require the plaintiff to prove that the perpetrator of the tampering was the defendant or that the defendant had access to the meter installation before a claim for loss of revenue can be made by the plaintiff. We agree with the argument of the plaintiff that the plaintiff's entitlement to claim for the loss of revenue is a statutory right conferred on the plaintiff under sub-s 38(3) read together with sub-s 38(1) of the EA 1990. We find support for our view in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* (Judicial Review Application No R1–25–24 of 2010) (unreported); *Tenaga Nasional Bhd v Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751 (CA); *Tenaga Nasional Bhd v Ternakan Air Wui Kyee Sdn Bhd & another appeal* [2015] MLJU 2136; [2015] 5 CLJ 955 (CA); *Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd)* [2014] 8 MLJ 280; *Tenaga Nasional Bhd v AWP Enterprise (M) Sdn Bhd* [2015] 3 MLJ 268 (CA); *Tenaga Nasional Bhd v Perniagaan Heng Thye Sdn Bhd* (Civil Appeal No K-04(NCVC)(W)-59–02 of 2014) (unreported). In

this connection, we would also add that there is also no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is made (*Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461 (CA); *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217 (CA)). Accordingly, we are constrained to set aside the findings of the learned judge on liability and to hold that the plaintiff is entitled to claim for loss of revenue and expenses from the defendant pursuant to sub-s 38(3) of the EA 1990.

[13] As to the quantum of the loss of revenue, we observe that the EA 1990 does not prescribe any specific method of calculation for loss of revenue. Nevertheless, we are of the view that on the facts of this particular case (ie the sudden drop in electricity consumption of 71%), the average consumption method of computation is a fair, acceptable and reasonable method to be employed in arriving at the quantum of loss of revenue (*Tenaga Nasional Bhd v Pelantar Cergas Sdn Bhd* (Civil Appeal No W-02(NCC)(W)-1552–07 of 2012) (unreported) (FC)). We have examined the evidence of the executive/engineer ('PW4'), who conducted the back-billing calculations to generate the amount of loss of revenue under supervision of the main engineer ('PW5'). PW4 had based the calculation from 28 September 2008 which was the date where there was a sudden drop in the electricity consumption at the defendant's premises to 29 September 2010, the date of the inspection. In arriving at the amount of under-billing, PW4 applied the average rate of electricity consumption. PW4's evidence was comprehensive, consistent and credible and demonstrates how the estimate is arrived at in calculating the back charges to be imposed. The defendant has not demonstrated that the back charges to be manifestly unreasonable, excessive or wrong. In her written judgment, the learned judge decided that the plaintiff was not entitled to the loss of revenue and expenses 'berdasarkan kepada keterangan saksi plaintif pengiraan jumlah terkurang caj daripada September 2008–September 2010 adalah tidak betul dan sangat memprejudiskan defendan apabila penukaran meter baru dibuat pada Mac 2010'. We are also constrained to find that the learned judge had failed to judicially appreciate the evidence and that if she had done so, she would have found that the plaintiff had established their claim for the loss or revenue on a balance of probabilities.

[14] We now turn to the claim for expenses in the sum of RM5,247.46 pursuant to sub-s 38(3) of the EA 1990. The claim was dismissed by the learned judge on the grounds that: (i) the plaintiff failed to produce any bills or receipts to support the claim; and (ii) the plaintiff failed to provide any particulars of the standard price or the plaintiff's guideline on the rates. With respect, we think the learned judge had misdirected herself on the law. In this instance, the written statement relating to the expenses incurred dated 29 September 2010 ('exh P12') was prepared by one Yong Boon Heng, Jurutera

SEAL-MV/HV was produced and marked as an exhibit. As such, in accordance with sub-s 38(4) of the EA 1990, exh P12 specifying the amount of the expenses incurred by the plaintiff shall be prima facie evidence of payment that has to be made by the defendant. In the absence of rebuttal evidence of the prima facie case made out by the plaintiff, we are satisfied that the plaintiff's claim for expenses incurred has been proved on a balance of probabilities.

[15] For the foregoing reasons, we set aside the order of the High Court and allowed the plaintiff's appeal with costs.

Appeal allowed with costs; order of High Court set aside.

Reported by Fatin Mohd Ismail